S APCR 2017 0027

IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL
(CRIMINAL DIVISION)

DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE No. 1 of 2017

ACQUITTED PERSON'S SUBMISSIONS

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Filed on behalf of:	The Acquitted Person
Prepared by:	Tel: 8602 1400
James Dowsley & Associates	Fax: 9640 0935
4/560 Lonsdale Street	Ref: Kieran Reynolds
Melbourne VIC 3000	Email: kieranr@dowsleyassociates.com.au
DX 449 Melbourne	

Background to the Reference

1. The Acquitted Person agrees with the Director of Public Prosecution's Narrative of the Trial Proceedings before Lasry J.[1] The Acquitted Person also agrees with the Director's Summary of Relevant Facts, which is taken from Lasry J's ruling on whether to give the jury a *Prasad* invitation.[2]

2. The Acquitted Person accepts that the appropriateness of giving a jury a *Prasad* 'direction' is a 'point of law' that arose in the proceeding before Lasry J, and, accordingly, that the Reference is properly brought to this Court under s 308 of the *Criminal Procedure Act 2009*.

The giving of a* Prasad *direction (or invitation) is not contrary to law

3. The Acquitted Person submits that the point of law raised by the Reference should be answered as follows: the giving of a *Prasad* direction is not contrary to law. The giving of such a direction, in appropriate cases, is consistent with a long line of authority, and

[1] DPP Submissions, 24 April 2017, Part A.
[2] Ibid, Part B.

furthers the important objective of ensuring the efficient disposition of criminal proceedings in the interests of justice.

4. The direction is, as King CJ stated in *R v Pahuja*, to be used 'sparingly'.[3] A conclusion that it would be inappropriate to exercise the discretion to give the direction in one case (or, indeed, most cases) should not be used as the basis for a general conclusion that the giving of the direction is, in all cases, contrary to law.

Nature of the direction (or invitation) – fact-finding role of the jury not usurped

5. It is convenient first to consider the contents of a *Prasad* direction. The direction given in this case may be used as an example. The key features of what Lasry J told the jury were as follows:

    a. A direction that the jury has the *right*, if *they choose to exercise it*, to bring in verdicts of not guilty at the conclusion of the prosecution case (emphasis added);[4]
    b. A direction that the jury may indicate that it wishes to hear more in relation to the charges;[5]
    c. A direction (which the judge emphasised) that determination of the facts is a matter for the jury, together with an observation that the jury has the right to bring in a not guilty verdict at the close of the prosecution of the Crown case in all criminal trials;[6]
    d. Directions of law as to the elements of the offence charged and the alternative;[7] and
    e. A brief summary of the main evidence relevant to the jury's consideration, together with directions on self-defence.[8]

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[3] (1987) 49 SASR 191, 201 ('*Pahuja*'). See also *Dean v The Queen* (1995) 65 SASR 234, 239 (Cox J).
[4] *DPP v Dunlop*, Trial Transcript, 23/11/16, 695.
[5] Ibid.
[6] Ibid 696.
[7] Ibid 697-704; 710-17.
[8] Ibid 704-710.

6. The direction extended over approximately 20 pages of transcript. His Honour summarised the evidence relevant to the jury's deliberations briefly. This was consistent with Cox J's statement in *Pahuja* that a *Prasad* direction ought be given 'quite simply and shortly'.[9]

7. In summary, the direction in this case invited the jury to consider there and then whether it was in a position to bring in a verdict of not guilty, or whether it wished to continue. It was an invitation to the jury to consider its position, albeit at an earlier stage than in 'usual' trial procedure. While the weakness of the prosecution case will be relevant to the exercise of the discretion to give the jury that invitation, nothing in what was said compelled the jury to decide the matter one way or the other. Rather, the jury made their decision after hearing the judge emphasise that determination of the facts was a matter for them.

8. For these reasons, cases sometimes refer to a *Prasad* 'invitation' rather than a 'direction'.[10] This is not an invitation to bring in a particular verdict, but an invitation to the jury to consider its option to bring in a verdict of not guilty at the close of the prosecution case, or to continue. Contrary to the Director's submissions, the *Prasad* direction does not 'cut across the quintessential fact-finding function of the jury'.[11]

Precedent

9. The *Prasad* direction has a long history. It has been given in many cases,[12] and, in many others, trial judges have decided against giving it.[13] The discretion of a trial judge to give the direction in an appropriate case has not been doubted.

10. The foundational case, *R v Prasad*,[14] was decided in 1979. It has not been overturned in South Australia. No court in any other Australian jurisdiction has stated that it was

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[9] (1987) 49 SASR 191, 218.
[10] See, eg, *Gant v The Queen* [2017] VSCA 104, [95] (Weinberg, Priest and McLeish JJA).
[11] DPP Submissions, 24 April 2017, [42].
[12] See, eg, *R v Smart (Ruling No 5)* [2008] VSC 94; *R v Rapovski (Ruling No 3)* [2015] VSC 356.
[13] See, eg, *DPP v Kocoglu* [2012] VSC 184.
[14] (1979) 23 SASR 161.

wrong. The Director does not point to any Australian authorities directly critical of *Prasad*.

11. The direction appears not to have immediately come into use in Victoria following the decision in *Prasad*. In 1983, Gobbo J (with whom Young CJ and Anderson J agreed), sitting in the Full Court in *R v Williams*,[15] stated that:

> Where there is some evidence sufficient to meet a no case submission, a judge may nonetheless have a discretion to invite the jury to acquit the accused. There has been some recognition of the existence of such a discretion in the past: see Benny v Dowling; Wilson v Kuhl. But I leave for future consideration the question as to what is the precise power of the trial judge to "invite" a jury to acquit, where there is a case to answer.[16]

12. That observation was made without reference to *Prasad*, which had decided the question in favour of a trial judge having such a discretion. The observation is therefore of limited utility in this case, but does reveal that the Full Court briefly addressed the issue, and did not reach a concluded view that was in any way contrary to *Prasad*. The same may be said of *Attorney-General's Reference (No 1 of 1983)*.[17] The Full Court published reasons in that matter the day after it delivered reasons in *Williams*. The Court (constituted as it was in *Williams*) there held that a trial judge is not entitled to *direct* the jury to acquit at the close of the prosecution case where there is a case to answer. While the Court referred to and followed *Prasad* on that point, it did not consider the practice of inviting a jury to consider whether to bring in a verdict of not guilty at the close of the prosecution case.

13. Therefore, as the matter stands, *Prasad* is a longstanding and unchallenged decision of an interstate intermediate appellate court. There are no statements of this Court or its predecessor which preclude its application in Victoria. As the Director accepts, the High Court in *Doney v The Queen*[18] did not prohibit the practice. Further, it has been consistently applied in Victoria. It has also been consistently applied elsewhere. For example, in *R v Reardon*, Simpson J observed that 'it has long been recognised in NSW

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[15] [1983] 2 VR 579 ('*Williams*').
[16] At 584 (citations omitted).
[17] [1983] 2 VR 410.
[18] (1990) 171 CLR 207.

that a judge may, in a suitable case, and in the exercise of his or her discretion, take the course outlined by King CJ [in *Prasad*]'.[19]

Recent High Court decisions do not impliedly overrule Prasad

14. At trial, the prosecutor raised the question whether the High Court's decision in *R v Baden-Clay*[20] meant that the *Prasad* direction was no longer viable. As the Director's submissions note, however, there was no argument on the issue.

15. The Director's submissions refer to the High Court's statement in *Baden-Clay* that the jury is to be viewed as 'the constitutional tribunal for deciding issues of fact'.[21] The Director also now relies on the High Court's decision in *IMM v The Queen*.[22]

16. Three points can be made in response to the Director's reliance on *Baden-Clay* and *IMM*.

17. First, *Baden-Clay* was not a case about jury directions. It was an appeal from a decision of an intermediate appellate court that a verdict was unreasonable. To view the case as having anything to say about the correctness of *Prasad* is to take it too far out of its context.

18. Secondly, and similarly, *IMM* was not a case about jury directions. It was a case about the proper construction of provisions of the uniform evidence law.

19. Thirdly, both cases comment on the function of the jury in a criminal trial as the trier of fact. As discussed above in these submissions, nothing in the *Prasad* direction usurps that role. The jury are simply invited to consider their position, and informed of their right to bring in a verdict of not guilty. Indeed, the direction in this case emphasised to the jury that they were the judges of the facts.[23]

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[19] (2002) 186 FLR 1, 32 [153].
[20] (2016) 334 ALR 234 ('*Baden-Clay*').
[21] Ibid 246 [65].
[22] (2016) 257 CLR 300.
[23] *DPP v Dunlop*, Trial Transcript, 23/11/16, 696.

The English cases

20. The Director accepts that the 'real nub' of this Reference stems from an analysis of English cases.[24] The Director relies in particular on the relatively recent English cases of *R v Kemp*,[25] *R v Speechley*,[26] *R v Collins*,[27] and *R v H(S)*.[28]

21. Given the strong precedential basis for the *Prasad* direction in Australia discussed above, considerable caution should be taken in relying on the English cases. In any event, the English cases do not state that the practice should cease. They merely list reasons why, in most cases, it would be undesirable to give the direction. This does not contradict the statement in *Pahuja* that the direction ought be given only 'sparingly' in appropriate cases.

22. In *Kemp*, the trial judge had expressed to the jury concern that, because of the unavailability of witnesses, 'we would have to adjourn today and come back tomorrow to hear the rest of the evidence and counsel's submissions…'. He instructed the jury that the case could be brought to an end, without hearing from further witnesses, if the jury were 'all agreed that [they] have heard enough of it'. The judge then referred to the evidence of a defence witness who had contradicted the evidence of prosecution witnesses, stating that it was an 'account which … you may think was entirely inconsistent with the account that you have heard from the three young women'. [29]

23. The Court of Appeal (McCowan LJ, Morland and Buckley JJ) observed that this direction, taken in context, would have been perceived by the jury as an intimation from the judge that 'they might well think, having heard that [witness], that it would be impossible for them to conclude that she was not giving an honest and accurate account'.[30] This situation is far removed from the present case, and the Court of Appeal's

[24] DPP Submissions, 24 April 2017, [53].
[25] [1995] 1 Cr App R 151 ('*Kemp*').
[26] [2004] EWCA Crim 3067 ('*Speechley*').
[27] [2007] EWCA Crim 854 ('*Collins*').
[28] [2011] 1 Cr App R 14.
[29] *Kemp* [1995] 1 Cr App R 151, 153-4.
[30] Ibid 154.

observations on the practice of 'inviting' a jury to consider its position must be read in the context of the direction given in that case.

24. The Court of Appeal in *Kemp* observed that '[w]e do not think it will always be very easy to distinguish between an invitation to acquit and a mere intimation of a right to stop the case'.[31] The Acquitted Person submits that the directions given by Lasry J in this case clearly fell within the latter category.

25. The Court of Appeal then observed that 'a jury may well use their common sense and read a mere intimation that they have a right to stop a case as an invitation to acquit, on the basis that a judge is not likely to be giving them the intimation unless he thinks that they should acquit'.[32] With respect, this is inappropriately speculative. In any event, any risk is easily met by appropriate direction along the lines Lasry J gave in this case, informing the jury that 'in *all* criminal trials a jury has the right' to bring in a not guilty verdict at the close of the Crown case.[33]

26. The case of *Speechley* did not directly raise the appropriateness of giving what is known in Australia as a *Prasad* direction. The relevant ground of appeal raised the question whether defence counsel — not the judge — could remind the jury of its right to acquit at any time after the close of the prosecution case. The Court (Kennedy LJ, Bell and Hughes JJ) concluded that the right to bring in a verdict of not guilty at that time 'can only be exercised if the trial judge invites the jury to consider exercising it'.[34]

27. The Court in *Speechley* then referred with approval to the observations in *Kemp* referred to above,[35] and went on to state that it found 'it difficult to envisage any circumstance where in reality it will be appropriate in the interests of justice for a judge to invite the jury to acquit'.[36] That observation did not need to be made to decide the case. Further, the

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[31] Ibid 156.
[32] Ibid.
[33] *DPP v Dunlop*, Trial Transcript, 23/11/16, 696 (emphasis added).
[34] [2004] EWCA Crim 3067, [51].
[35] Ibid [52].
[36] Ibid [53].

observation that appropriate circumstances to give the invitation may be 'difficult to envisage' differs from the practice of giving the direction 'sparingly' only by degree.

28. In *Collins*, Gage LJ, giving the judgment of the Court, stated that inviting the jury to bring the trial to an end at the close of the prosecution case 'has been comprehensively disapproved'. The Court did not, however, state that the practice could never be appropriate, or hold that it would be necessarily be an error for a trial judge to give such a direction. Gage LJ appeared to acknowledge that there may be circumstances in which the direction was appropriate, noting that 'at the very least it [the practice of giving the direction] could only be exercised in the most exceptional circumstances and certainly not in a multi-handed case of some complexity'.[37] As with *Speechley*, this observation differs from the Australian practice of giving the direction 'sparingly' only by degree.

29. The Court went on to list eight 'dangers' associated with giving such a direction. These are set out in full in the DPP's Submissions. The Acquitted Person submits that these 'dangers' are, in fact, merely reasons why the discretion to give a *Prasad* direction should be exercised 'sparingly', and only in appropriate cases where, for example, the factual evidence is not complex and there is only one accused (see the fifth 'danger' noted in *Collins*).[38]

30. Other 'dangers' mentioned in *Collins*, such as the risk of a jury being 'keen to register independence' and the need to avoid being seen as inviting the jury to acquit (see the third and fourth 'dangers') can be addressed by an appropriately worded direction, as was given in this case, which emphasises that the jury is the trier of fact. Other 'dangers' mentioned by Gage LJ concern possible prejudice to the prosecution in presenting its case. Again, this may be a proper matter for a trial judge to take into account in determining whether to exercise the discretion to give a *Prasad* direction. It is likely to be a more pressing concern where the prosecution evidence is complex and requires explanation by way of address.

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[37] [2007] EWCA Crim 854, [48].
[38] As to the undesirability of giving a *Prasad* direction where the Crown case is complex or difficult to understand without addresses and summing-up, see *Seymour v The Queen* (2006) 162 A Crim R 576.

31. The final case mentioned is *R v H(S)*. The direction given in that case can only be described as a clear invitation to acquit. The judge had told the jury that he had withdrawn one count from their consideration, but that there was some evidence that would entitle them to convict on a second count, so it would be improper for him to withdraw the case on that count. He added that it was, however, open to the jury at any stage to acquit the accused. He told the jury to retire for 'two or three minutes' to consider whether they wanted to hear more evidence. After the jury returned with a not guilty verdict, the judge described the case as a 'scandalous waste of taxpayers' money'.[39]

32. The Court of Appeal did not have to consider the correctness of a properly worded direction inviting the jury to consider its position at the close of the prosecution case. Leveson LJ (delivering the judgment of the Court) did, however, refer to criticisms of the practice, including those made in *Collins*, and also referred to the interests of victims and witnesses in having the trial heard through to a conclusion culminating in a fair analysis of the issues from the judge.[40] It is important to observe, however, that the Court did not hold that it would never be appropriate to give a properly worded direction. Leveson LJ expressly stopped short of doing so, stating that '[t]his is not the case in which to go further than the authorities have hitherto decided although we do echo and endorse the views expressed by this court in the cases set out above'.[41]

33. In summary, the English cases (i) express the reasons why a *Prasad* direction should be given only in rare cases, or 'sparingly';[42] and (ii) fall short of holding that a direction inviting the jury to consider its position at the close of the prosecution case will never be appropriate.

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[39] [2011] 1 Cr App R 14, [14]-[15].
[40] Ibid [50].
[41] Ibid [51].
[42] See *Pahuja* (1987) 49 SASR 191, 201 (King CJ).

Advantage of the Prasad *direction – avoiding unnecessary delay in the criminal justice system*

34. An appropriately worded *Prasad* invitation helps to ensure the efficient administration of the criminal justice system by avoiding delay associated with unnecessarily prolonged trials. As the English Court of Appeal stated in *Speechley*, 'we accept that in some cases judicial silence may mean that a trial lasts longer than it need'.[43]

35. Further, the Director does not challenge the jury's right to return a verdict of not guilty at the close of the prosecution case. He submits only that it would be 'contrary to law' ever to tell the jury about that right. If the direction is properly worded, as it was in this case, and the discretion to give it is properly exercised, it is difficult to see how informing the jury of a right they hold can be 'contrary to law'.

Conclusion

36. The direction given in this case clearly informed the jury that (a) it was their role alone to determine the facts; and (b) they were simply being given an opportunity to consider whether to exercise their right to bring in a not guilty verdict at the close of the prosecution case. There was no risk that a direction expressed in these terms would usurp the jury's role.

37. The point of law raised by the Reference should be answered as follows: the giving of a *Prasad* direction is not contrary to law.

O P Holdenson QC

J O'Connor

1 June 2017

[43] [2004] EWCA Crim 3067, [53].